

STATE OF MICHIGAN
COURT OF APPEALS

In re A.R. MCCRAY, Minor.

UNPUBLISHED
November 25, 2014

No. 322056
Bay Circuit Court
Family Division
LC No. 13-011333-NA

Before: K. F. KELLY, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to a child under MCL 712A.19b(3)(c)(i) (conditions leading to adjudication continue to exist), (c)(ii) (failure to correct other conditions), and (g) (failure to provide proper care or custody).¹ We affirm.

I. FACTS

Petitioner asked the court to take jurisdiction over the child and remove her from respondent's custody on February 14, 2013, following a domestic violence dispute between respondent and her mother, with whom respondent and the child were residing. The petition alleged that respondent had a Child Protective Services (CPS) history that included a substantiation for physical neglect; failure to provide suitable, safe, housing conditions; and mental health issues. It also alleged that respondent was currently homeless.

At the adjudication, respondent admitted to certain allegations made in an amended petition, including that she had been diagnosed with bipolar disorder, attention deficit hyperactivity disorder (ADHD), depression, and anxiety, and that she did not have proper housing for the child. Respondent further stated that she was willing to let the court take temporary custody of her child, which the court did. The court noted that respondent had already received numerous services, including financial and medical assistance, a psychological evaluation, mental health services, parenting classes, and a parenting aide.

¹ The trial court also terminated the parental rights of the child's father. He is not participating in this appeal.

At a dispositional hearing, Department of Human Services (DHS) worker Justin Morin stated that respondent was participating in substance-abuse screens, but that she tested “off the charts” for alcohol and also tested positive for marijuana and amphetamines. He said, however, that respondent had found a two-bedroom apartment, which he described as “very nice” and suitable. Arguing that she had resolved her housing problem, respondent subsequently filed an objection to the child’s placement. At the hearing on her objection, respondent’s counsel argued that her substance-abuse screens from June 7, 2013, came back negative, that she entered drug court on her own volition, and that she was taking parenting classes. The trial court denied the objection and continued the child’s placement in foster care, explaining that housing was not her only issue. The court stated that respondent’s admission that she needed treatment demonstrated that she had an ongoing substance-abuse problem.

At a review hearing held approximately 1 and 1/2 months later, Morin stated that respondent had been doing well with respect to parenting time, but that her participation in services had “not been exactly stellar” due to schedule conflicts, transportation issues, and medical issues related to her stomach. He also said respondent was still testing positive for alcohol and that her compliance with outpatient substance-abuse treatment had been marginal.

Another review hearing was held about 3 and 1/2 months later, on October 16, 2013; respondent failed to attend. At the hearing, DHS representative Lindsey Dembowske stated that the child was doing well in her foster care placement. Dembowske said that respondent was advised to attend monthly psychiatric reviews but had not attended since May 21, and that respondent was referred for weekly therapy for emotional stability and substance-abuse issues but had only gone to six individual sessions since March 13, 2013, last participating on August 15, when the therapist met respondent in the hospital. Dembowske also said that respondent was advised to participate in two weekly treatment programs, but that she had only completed one program and was asked to leave the second for being under the influence and smelling strongly of alcohol. She said also that respondent tested positive for alcohol on a number of occasions, missed several drug screens, and had two face-to-face interactions with DHS personnel while being severely intoxicated.

Dembowske also said that respondent had been referred for parenting classes but had only completed two of the 20 sessions, and that several other areas of concern had arisen, involving her domestic relationship, housing, and social support system. According to Dembowske, respondent provided a bottle of prescribed Vicodin during a home visit that had been filled five days prior with 40 pills but only had nine pills remaining. Respondent reportedly said her boyfriend had taken some of the pills, and a background check showed that her boyfriend had two prior “felony concealed weapons charges, a felony armed robbery, a felony breaking and entering, and two operating while impaired charges.” Dembowske said respondent also had earlier reported that she needed \$700 to avoid a looming eviction, which she reportedly avoided. Dembowske also reported that respondent’s attendance at her parenting time visits was inconsistent and that she was not always appropriate with the child. Dembowske also said that respondent admitted that her visits with the child triggered her substance abuse.

A termination petition was filed on March 26, 2014, alleging statutory grounds for termination under MCL 712A.19b(3)(c) and (g). At the termination hearing on May 14, 2014, which respondent did not attend, respondent’s attorney asked to withdraw, explaining that

respondent sent him a text message the previous day informing him that he was no longer her attorney. The court denied the request, noting that the trial date had been set in March and that respondent had not since that time told the court she wanted a new attorney and did not hire a new attorney.

Michael Ingram, M.D., staff psychiatrist at McLaren Bay Region Hospital, testified that he had not had contact with respondent in more than two years, but that he had previously diagnosed her with bipolar disorder, ADHD, and posttraumatic stress disorder, and had prescribed her a number of medications, including Adderall. He said he removed her from Adderall, which he described as a fairly addictive amphetamine, after reported incidents of it being lost or stolen. He also stated that she had been “on a Vivitrol injection” to assist with alcohol dependency.

Tracey Riley testified that she investigated respondent between April 2012 and February 2013 for issues including physical neglect, substance abuse, and poor home conditions. Riley said she expressed a concern to respondent about alcohol usage in September 2012 and that respondent replied, “I’m a 35 year old woman, and I will drink when I want.” Riley also testified that respondent had numerous housing situations during her investigation and that some of them were appropriate. Megan D’Autremont, the child’s foster mother, described the child as shy but sassy, and said she would have had temper tantrums a couple times a week. D’Autremont said that in January, respondent stopped appearing for visitation.

Dembowske testified to respondent’s lack of consistent participation in the services provided and parenting time. In Dembowske’s opinion, there was no bond between respondent and the child. Dembowske also said that respondent “appeared to be under the influence” during some visits. Dembowske said she presented respondent with an oral screen after one such incident and that respondent tested positive for amphetamines. She said too that there were times that respondent failed to produce urine screens after being asked to do so.

According to Dembowske, respondent was discharged from her individual substance-abuse sessions for failing to attend. Dembowske said respondent was similarly sporadic in attending group sessions. Regarding respondent’s drug screens, Dembowske said they largely reflected no-shows, positive tests for alcohol, and some positive tests for amphetamines, but that a few came back negative. The court took notice that respondent was required to make drops for screens three times a week for over a year, and that respondent had 16 negative drops during that time.

Regarding respondent’s mental health, Dembowske said respondent had been referred for psychological treatment at two different locations, but that she was ultimately dropped from both as a result of her sporadic attendance.

Regarding housing, Dembowske said respondent was residing in a home under a lease she signed on May 1, 2013, but that she had had multiple threats of eviction due to back payments and had said numerous times that she was moving. Dembowske said she tried to inspect respondent’s home on May 5 based on previous concerns about the conditions of her home, but that respondent would not allow her inside.

Dembowske also said she was concerned with respondent's domestic relations, explaining that her boyfriend had an extensive criminal history. She said respondent reported that her boyfriend taught her how to make "jailhouse vodka" while she was in "detox."

According to Dembowske, respondent "gave up" at a certain point and stopped participating in services. Dembowske said the child was doing "phenomenally" well in foster care, but developed issues in response to respondent's inconsistent contact.

The trial court found statutory grounds to terminate respondent's parental rights under MCL 712A.19(b)(3)(c)(i), explaining that respondent's housing and mental health issues continued to exist as evidenced by her failure to cooperate with her mental health providers, her positive drug tests, and her refusal to let people into her home to inspect whether it was proper. The trial court also found statutory grounds to terminate respondent's parental rights under MCL 712A.19(b)(3)(c)(ii) based on her continuing substance-abuse issues. Finally, trial court found statutory grounds to terminate respondent's parental rights under MCL 712A.19(b)(3)(g), explaining that respondent had weaned herself off of participation in services beginning in October, made no effort to "make things up to" the child, and failed to even show up at the termination hearing.

Next, the trial court determined that termination was in the child's best interests, explaining that respondent's conduct caused a disruption in the parent-child relationship and that respondent proved unable to benefit from services. The court entered its order terminating respondent's parental rights.

II. STANDARDS OF REVIEW

We review for clear error both the trial court's decision that a ground for termination has been proven by clear and convincing evidence and the trial court's decision that termination was in the best interests of the minor. See *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision is "clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

We review for an abuse of discretion a trial court's decision regarding a motion for counsel to withdraw, as well as a decision regarding a motion for a continuance to obtain counsel of choice. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999); *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (internal citation and quotation marks omitted).

III. ANALYSIS

A. STATUTORY GROUNDS FOR TERMINATION

Respondent's parental rights were terminated under MCL 712A.19b(3)(c)(i), (c)(ii), and (g), which provide:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

Respondent first argues that the statutory ground for termination in MCL 712A.19(b)(3)(c)(i) was not proven by clear and convincing evidence because the primary condition leading to the adjudication was respondent's lack of housing, and the evidence demonstrated that she rectified that issue by obtaining a suitable home.

As respondent correctly asserts, one condition leading to the adjudication was her housing situation. She admitted that, at the time the petition was filed in February 2013, she did not have proper housing to appropriately care for the child. Although her caseworker stated on May 3, 2013, that respondent had found a very nice apartment that was suitable, her subsequent caseworker testified that respondent was thereafter threatened with eviction multiple times for nonpayment of rent, that respondent said she was moving numerous times, and that respondent refused to permit an inspection of her home to determine whether it was in proper condition.

Based on this testimony, the trial court did not clearly err in concluding that respondent's housing situation was unstable and that respondent had not rectified her housing barrier. Further, respondent's failure to obtain suitable and stable housing over 15 months justified the trial court's conclusion that she would be unable to do so within a reasonable time considering the child's age.

Moreover, respondent does not acknowledge that her mental health issues also led to the adjudication and that she admitted to having problems with bipolar disorder, ADHD, depression, and anxiety. Based on her caseworker's testimony that she was referred for psychological treatment at two locations and was dropped from both due to her lack of attendance, the trial court did not clearly err in concluding that her mental health issues continued to exist and that respondent showed no signs of resolving those issues, let alone within a reasonable time considering the child's age.

Respondent also argues that the trial court erred in relying on her substance-abuse issues for purposes of MCL 712A.19(b)(3)(c)(ii) because it was her housing issues, rather than her substance-abuse issues, that caused the child to come within the jurisdiction of the Court. As *In re Sours*, 459 Mich 624, 636; 593 NW2d 520 (1999), makes clear, MCL 712A.19(b)(3)(c)(ii) applies to "conditions that *would* bring the child within the jurisdiction of the court," as opposed to those that did lead to the adjudication (emphasis added). Accordingly, respondent's argument that the trial court was not permitted to consider her substance-abuse issues under MCL 712A.19(b)(3)(c)(ii) fails as a matter of law; she does not contest the other prerequisites of MCL 712A.19(b)(3)(c)(ii).

Respondent also argues that the statutory ground for termination in MCL 712A.19(b)(3)(g) was not proven by clear and convincing evidence because there was no evidence that respondent's substance-abuse issues had posed a direct threat to the child's safety. Respondent further argues that she demonstrated a willingness to address her substance-abuse issues such that she could have cured them within a reasonable time considering the child's age.

Contrary to respondent's argument, under the plain language of MCL 712A.19(b)(3)(g) the trial court was not required to find that there was evidence of a direct threat to the child's safety. In any event, respondent fails to address the basis of the trial court's decision under § 19(b)(3)(g), which involved respondent's conduct in voluntarily discontinuing her participation in services beginning in October 2013; making little, if any, effort to improve her ability to care for the child; and failing to appear at her termination hearing. Accordingly, this Court need not consider respondent's argument. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).²

² Nevertheless, we note that there was ample evidence that respondent had a serious issue with substance abuse. She admitted to having a substance-abuse problem, she repeatedly tested positive on her substance-abuse screens, and she failed to participate in screens on numerous other occasions. In fact, the testimony showed that she was required to submit to substance-abuse screens three times a week for over a year but only produced 16 negative screens during

There was also ample evidence supporting the trial court's conclusion that respondent would not be able to provide proper care and custody within a reasonable time considering the child's age, including respondent's failure to participate in and complete services, her voluntary decision to stop attending parenting time visits, and her caseworker's testimony that she had apparently given up trying to rectify her situation. See *In re BZ*, 264 Mich App 286, 300; 690 NW2d 505 (2004) (affirming the trial court's decision that the ground in § 19b(3)(g) had been established where the respondent "maintained employment and ultimately separated from her abusive boyfriend, [but] only minimally complied with the more important aspects of the family plan, including visitation with the children"). Accordingly, respondent has failed to show that the trial court clearly erred in determining that the statutory ground for termination in MCL 712A.19(b)(3)(g) was proven by clear and convincing evidence.

B. BEST INTERESTS DETERMINATION

Next, respondent argues that the trial court erred in concluding that terminating her parental rights was in the child's best interests. "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014).

Respondent asserts that the child's best interests would have been better served by giving respondent the "opportunity" to demonstrate that she could be a responsible parent. However, the evidence clearly shows that respondent received numerous opportunities over the course of 15 months to demonstrate that she could be a responsible parent and that respondent failed to take sufficient advantage of those opportunities. As her caseworker testified, respondent simply gave up, leaving the trial court with no evidence suggesting that she could become a responsible parent in the foreseeable future. See *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012) ("While respondents did make some progress in addressing their issues, the evidence showed that it was unlikely that the child could be returned to her parents' home within the foreseeable future, if at all."). Accordingly, respondent fails to show that the trial court erred in making its best interests determination.

that time. Further, there was evidence that respondent continued to date a man who obstructed her substance-abuse recovery by teaching her how to make vodka during her detoxification program. It is clear that respondent had a serious substance-abuse problem that, in combination with her other issues as discussed above, impacted her ability to provide proper care for her child.

C. RIGHT TO COUNSEL

Finally, respondent argues that the trial court abused its discretion and deprived her of her constitutional rights to due process and equal protection when it denied her trial counsel's motion to withdraw and adjourn the termination hearing so that respondent could retain new counsel.

As this Court stated in *In re Powers Minors*, 244 Mich App 111, 121; 624 NW2d 472 (2002):

A parent in a termination proceeding has the right to retain an attorney and, if financially unable to retain counsel, has the right to "request and receive" a court-appointed attorney as a matter of statute and court rule. The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel. [Citations omitted.]

Although respondent was clearly entitled to the right to counsel at her termination hearing, we find no abuse of discretion with regard to the trial court's ruling. In the analogous criminal context, this Court has stated:

When reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a defendant's motion for a continuance to obtain another attorney, [courts] consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Echavarria*, 233 Mich App at 369.]

Respondent does not now, nor did she below, identify a bona fide dispute with her attorney. Further, she makes no claim that she was prejudiced by her attorney's performance at any point in the proceedings. Moreover, respondent was clearly negligent in asserting her request for new counsel, having waited until the day before her termination hearing. It can reasonably be presumed by her failure to attend the termination hearing and assert her right to counsel of choice that she wished only to delay the proceedings. Accordingly, respondent has failed to show that the trial court abused its discretion or deprived her of any constitutional rights in denying her counsel's motion to withdraw and adjourn the termination hearing.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Patrick M. Meter